U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

DN

MAY 04 200

File: WAC-04-007-50066 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that operates as an importer and exporter. The petitioner claims that it is the subsidiary of Shanghai ChangCheng Craft & Gift Co. Ltd., located in Shanghai, China. The beneficiary was initially approved for L-1A status in the United States to open a new office. The beneficiary was subsequently approved for an extension of his L-1A status, and the petitioner now seeks to again extend the beneficiary's stay for an additional two-year period.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will supervise subordinate employees that will relieve him from performing non-qualifying duties, including three new employees hired since the date of filing the petition. Counsel further asserts that the petitioner filed an amended IRS Form 1120, U.S. Corporate Income Tax Return, showing that it has a qualifying relationship with the foreign entity. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documents.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter filed with the initial petition on October 3, 2003, the petitioner described the beneficiary's job duties as follows:

> As the company's General Manager and CEO, [the beneficiary] is responsible for managing all aspects of the business operations in the U.S. He serves as a director on the board of [the petitioner], a position he has held since its incorporation. He has participated in the strategic planning that led to [the foreign entity's] decision to enter the American market through [the petitioner]. [The beneficiary] formulated the business planning that led to the establishment of the business and has played a key role in establishing important relationships with U.S. and Chinese importers and exporters. Over the last ten months, [the beneficiary] oversaw the establishment of [the petitioner's] office, the hiring of its staff, and the establishment of warehouse, distribution and retail operations in California.
>
> * * *
>
> As General Manager and CEO, [the beneficiary] will continue to primarily manage [the petitioner] on all aspects of business operations. He will continue to be charged with final responsibility for the fiscal performance of [the petitioner], as well as the direction and implementation of organizational goals and corporate procedures. He will manage efforts to expand [the petitioner's] business operations in North America and increase both import and export activity with China. He will represent [the petitioner] before key American and Chinese suppliers and purchasers, with authority to negotiate and commit the corporation to contractual obligations without monetary limitation. [The beneficiary] will have authority to hire local staff, enter into agreements with American suppliers and distributors, and maintain relationships with key business partners, financial and legal advisors. [The beneficiary] will function at a senior level within the organizational hierarchy of [the petitioner].

The petitioner provided its IRS Forms 941, Employer's Quarterly Tax Return, for the first, second, and third quarters of 2003. The petitioner further submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for the first and second quarters of 2003.

On December 19, 2003, the director issued a Notice of Intent to Deny the petition. In part, the director stated that the petitioner's 2002 IRS Form 1120, U.S. Corporate Income Tax Return, calls into question the petitioner's staffing and business operations, as the document shows no labor costs, no purchases, and an inventory valued at $18,617.00. The director further stated that "[t]here is insufficient evidence to demonstrate that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees who will relive him/her from performing non-qualifying duties." The director found that the petitioner failed to show that the beneficiary will function at a senior level within the organization, or that he will be relieved from performing day-to-day duties.

In a response dated January 15, 2004, in part the petitioner submitted: (1) copies of 2003 Forms W-2 showing funds paid to seven individuals; (2) an organizational chart; (3) position descriptions for the petitioner's employees; (4) and a letter further addressing the beneficiary's duties and subordinates as follows:

> When [the petitioner] filed the L-1A extension petition on [the beneficiary's] behalf in October 2003, the company had four employees. [The beneficiary] (President), [redacted] hipping), and [redacted] . . . Over the past three months, the company has added three additional employees: [redacted] and [redacted] (Sales Representatives), and [redacted] Shipping Assistant). . . . It has also contracted the accounting and bookkeeping support of [redacted]
>
> [The beneficiary] oversees his business but does not directly perform the functions managed. These duties are performed by the professionals under [the beneficiary's] supervision. [The beneficiary] is not trained in and does not carry out specialized duties in finance, shipping and sales. These duties have been delegated to his professional staff who meet with [the beneficiary] on a regular basis to ensure that sales, finance and shipping operations are proceeding smoothly, and [the beneficiary] gives each of his subordinates guidance and authorization to proceed in their respective areas.

On January 30, 2004, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director reiterated the grounds for denial as stated in the Notice of Intent to Deny, and indicated that the petitioner failed to overcome those grounds. The director noted that the petitioner provided evidence that was already entered into the record, and thus did not document its claim to have hired three new employees.

On appeal, counsel asserts that the beneficiary will supervise subordinate employees that will relieve him from performing non-qualifying duties. Counsel again states that the petitioner hired three additional employees. In support of this assertion, counsel provides copies of the petitioner's California Form DE-6, Quarterly Wage and Withholding Report, and IRS Form 940, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2003. Counsel submits a brief in which he discusses the petitioner's operations and the beneficiary's duties as follows:

> **Petitioner's Business Nature Did Not Require it To Hire More Employees Than it Did.** As an importer of goods, petitioner does not have any direct contact with the general public. Rather, it relies exclusively on its networking capability with mass merchandisers. Sometimes, goods went from petitioner's factory in China to petitioner's U.S. customers. Also, sometimes, petitioner's U.S. customers are referred to the Chines [sic] factory directly. As such, petitioner does not always have to stock [a] large volume of merchandises [sic].
>
> Contrary to the Service's belief that [the beneficiary] performs day-to-day functions, [the beneficiary] seldom performs such functions. [The beneficiary] relies manages [sic] and

> relies [on] . . . [the] petitioner's sales manager, to manage the company's sales representatives and dealing with large buyers.
>
> [The beneficiary] also relies on its finance manager . . . to manage the company's accountant . . . on all financial related matters, such as accounts payable, receivables, etc.
>
> Finally, petitioner's manager is solely responsible in managing [redacted] [sic] [redacted] with respect to local deliveries shipping, and international shipping.
>
> As stated above, [the beneficiary] needs not and does not to [sic] perform any daily functions.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner does not clarify whether it is claiming that the beneficiary will be primarily engaged in managerial duties or executive duties. The petitioner indicates that the beneficiary will act as the general manager and chief executive officer, thus it appears that the petitioner intends to represent that the beneficiary will be employed in both capacities. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity under section 101(a)(44)(B) of the Act, and the statutory definition for managerial capacity under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The beneficiary's job descriptions submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statement that the beneficiary "is responsible for managing all aspects of the business operations in the U.S." does not indicate what tasks the beneficiary will perform on a daily basis. The petitioner makes the broad indication that the beneficiary "will continue to be charged with final responsibility for the fiscal performance of [the petitioner], as well as the direction and implementation of organizational goals and corporate procedures." Yet, this statement does not describe what activities the beneficiary will perform to assess and manage the petitioner's financial performance, or what daily measures he will take to oversee goals and procedures. The petitioner states that the beneficiary will "represent [the petitioner] before key American and Chinese suppliers and purchasers," yet the petitioner has not sufficiently described this duty such that the AAO can determine whether it is a managerial or executive function, or a non-qualifying sales activity.

In responding to the director's request for evidence and addressing the grounds for denial on appeal, the petitioner explained that the beneficiary "is not trained in and does not carry out specialized duties in finance, shipping and sales." The petitioner provides that the beneficiary's subordinates perform the daily duties associated with these functions. While petitioner has discussed what the beneficiary does not do, it has failed to sufficiently explain what actual daily duties consume the beneficiary's time. Going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* Thus, the provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner provides that that beneficiary will have supervisory authority over six subordinate employees, including a sales manager, financial manager, shipping manager, two sales representatives, and shipping assistant. The petitioner further states that the beneficiary will supervise a contract accountant. However, the petitioner indicated that it hired three of these employees after the date of filing, including the two sales representatives and shipping assistant. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As three of the beneficiary's subordinates were hired after the date of filing the petition, they are not probative of the petitioner's and beneficiary's eligibility as of the filing date, and they will not be considered in this proceeding.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, while the petitioner has indicated that the sales manager, financial manager, shipping manager, and accountant earned university degrees, it has not provided the subjects they studied. Thus, the petitioner has not established that their degrees are actually required to successfully perform their duties, and they cannot be deemed professional employees.

Nor has the petitioner shown that any of the beneficiary's subordinates supervise other staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with the beneficiary's foreign employer, as required by 8 C.F.R. § 214.2(l)(3)(i).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.
>
> (H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> * * *
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer, as the foreign entity owns 100 percent of the petitioner's stock. In support of this assertion, the petitioner

submitted a stock certificate that reflects that the foreign entity acquired 100 shares of the petitioner's stock in April 2000. The petitioner provided its articles of incorporation that show that it is authorized to issue 10,000 shares of stock. The petitioner provided a copy of its 2001 and 2002 IRS Forms 1120, U.S. Corporate Income Tax Return. Schedules K of the returns indicate that the petitioner: (1) is not a subsidiary in an affiliated group or a parent-subsidiary controlled group; (2) does not have any shareholders that own 50 percent or more of the petitioner's voting stock; and (3) does not have any foreign shareholders who own at least 25 percent of the petitioner's stock.

In the director's Notice of Intent to Deny, in part the director pointed out that the petitioner's 2002 IRS Form 1120 is incongruent with its claim to be a wholly-owned subsidiary of the foreign entity.

In response, counsel stated that:

> [The petitioner's] 2002 Form 1120 "was inadvertently prepared without indicating that the U.S. corporation is the subsidiary of a foreign corporation (Schedule K, Part 4 and Part 7) and the company also inadvertently omitted Form 5472 Information Return of a 25% Foreign-Owned U.S. Corporation. Unfortunately, the company's new accountant . . . was not familiar with these reporting requirements. These errors have been corrected.

The petitioner submitted a revised 2002 Form 1120 that reflects that the petitioner is a wholly-owned subsidiary of the foreign entity. The revised Form 1120 is not signed by an authorized represented of the petitioner, and the petitioner did not provide evidence to show that it was filed with the Internal Revenue Service.

In the director's denial, in part he found that the petitioner did not establish that it has a qualifying relationship with the beneficiary's foreign employer. The director reiterated his observations regarding the 2002 Form 1120 as stated in the Notice of Intent to Deny. The director noted that the revised Form 1120 was not signed, and was not accompanied by evidence that it was filed with the appropriate government office. The director stated that the petitioner tried to make a material change in the petition in an effort to conform to service requirements.

On appeal, counsel asserts that the petitioner did file an amended IRS Form 1120, U.S. Corporate Income Tax Return, showing that it has a qualifying relationship with the foreign entity. The petitioner provided no new evidence to support that it has a qualifying relationship with the foreign entity.

Upon review, counsel's assertions are not persuasive on this point, and the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the

establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the petitioner initially submitted a 2002 Form 1120, U.S. Corporate Income Tax Return, that contradicts its claim to be a wholly-owned subsidiary of the foreign entity, as discussed above. Though the petitioner provided a revised version in response to the director's Notice of Intent to Deny, the revised copy is not signed by an authorized representative of the petitioner. In his denial, the director called into question whether the revised Form 1120 was actually filed with the Internal Revenue Service. Yet, on appeal the petitioner fails to submit evidence of filing the amended return beyond a brief statement from counsel. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the petitioner has failed to establish that the amended return was filed, and it is given no weight in this proceeding.

With the initial petition, the petitioner further provided its 2001 Form 1120, U.S. Corporate Income Tax Return. This return is also inconsistent with the petitioner's claim to be a wholly-owned subsidiary of the foreign entity, as the accompanying Schedule K indicates that the petitioner: (1) is not a subsidiary in an affiliated group or a parent-subsidiary controlled group; (2) does not have any shareholders that own 50 percent or more of the petitioner's voting stock; and (3) does not have any foreign shareholders who own at least 25 percent of the petitioner's stock. The petitioner has not addressed this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In the Notice of Intent to Deny, the director put the petitioner on notice that its relationship to the foreign entity is in question. Yet, the petitioner has failed to supplement the record with additional evidence to prove the alleged parent-subsidiary relationship. Based on the foregoing, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(i). For this additional reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met this burden.

ORDER: The appeal is dismissed.